Supreme Court U.S.
FILED
JUL 7 1971
E. ROBERT SEAVER, CLERK

70-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1816

MAROCEANO COMPANIA NAVIERA S.A., as Owner of S.T. PENTELIKON,

Respondent,

against

S.S. VERDI, her engines, etc., and ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE), as Owner of S.S. VERDI,

Petitioner,

against

S.T. PENTELIKON, her engines, etc., and MAROCEANO COMPANIA NAVIERA S.A.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

Neither Petitioner's "Statement of the Case" nor its outline of the "Questions Presented" is in accordance with the facts as found by the Trial Judge, and consequently

neither conveys an accurate representation of the unanimous decision of the United States Court of Appeals for the Second Circuit.

The Petition presents the not unusual case of a "burdened" (giving-way) vessel in a crossing situation, having confessed fault for violating her statutory duty to stand clear of the "privileged" (holding on) vessel, laboring to impose equal blame on the privileged vessel which adhered to the International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 143-47*, by holding course and speed until it became apparent that a collision could not be avoided by action of the burdened vessel alone.

The burdened Verdi sighted the privileged Pentelikon off her starboard bow while the latter was steaming eastward near the Straits of Gibraltar on a clear night. Thereafter the Verdi, outbound from the Mediterranean and heading in a general southwesterly direction, maneuvered to avoid a third vessel and in the process lost track of the Pentelikon until she and the Verdi were approximately a half mile apart. Thereupon the Verdi, contrary to the express mandate of Rules 22 and 23, 33 U.S.C. §§ 146 (f) and (g), turned to port in an attempt to cross the bow of the Pentelikon, instead of making a turn to starboard, which would have taken her clear of that vessel.

Meanwhile, the Pentelikon had observed the Verdi off her port bow and had maintained her course and speed, as she was not only permitted but required to do under the Regulations, while her Master attempted to alert the Verdi to her duty by flashing the letter "U" (two short flashes and one long one) by "blinker" light, meaning, under the

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* The reference is to the Regulations in force at the time of the collision. The Regulations cited by Petitioner (Petition, pp. 3-4), 33 U.S.C. §§ 1051-94, did not take effect until September 1, 1965, some 18 months after the collision. However, the four Regulations cited by Petitioner were not changed in the new Regulations.

International Signal Code, "You are standing into danger". The Pentelikon's Master received no response to either the first or a second such signal, given approximately three minutes before the collision. When the vessels were still a distance apart estimated at a mile and a half on the basis of the relative speed at which they were approaching each other, he sounded a danger signal on the ship's whistle.

Petitioner argues that at the time the danger signal was sounded the Pentelikon's Master realized that the Verdi could not avoid collision alone. This argument would seem to assume that in fact the Verdi was unable at that moment to avoid collision singlehandedly. Respondent vigorously disputes the validity of any such assumption, which has no support in the findings below. The state of mind of the Pentelikon's Master at that moment is therefore wholly immaterial, but in any event the best evidence of his subjective attitude, even if it were relevant, is the objective meaning of the signal he used. The danger signal indicates *doubt* as to whether another vessel is taking sufficient action to avoid collision. Rule 28 of the International Regulations, 33 U.S.C. § 147. When no reply was received to that signal the Pentelikon turned hard to starboard and reversed her engines. Her navigation in this regard was precisely in accordance with the Regulations. Rule 21, 33 U.S.C. § 146(e).

There was *no* finding by the Trial Court that the Pentelikon's Master did not take avoiding action until "2½ minutes after" he "realized that Verdi alone could not avoid collision". This statement of Petitioner undoubtedly has its origin in its persistent misreading of the testimony of the Pentelikon's Master. To accept the Verdi's version of the facts would require the assumption that the Pentelikon's Master, after having conscientiously endeavored to alert the Verdi to her duty of keeping out of the way on three separate occasions—twice by flashing

light and once by a whistle signal—thereafter permitted the collision to occur by doing nothing. Such an assumption would not only be contrary to the facts as found by the District Court, but would be beyond belief when applied to the Master of a potentially explosive supertanker. As the Court of Appeals stated, in holding the Verdi solely at fault:

> "The Trial Court held that when the *in extremis* point was reached, the Pentelikon was obliged 'to take some affirmative action toward avoidance of the collision'. But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, whereas the Verdi, which could have avoided a collision, took affirmative action by turning in the wrong direction, thus colliding with the Pentelikon. The Trial Court found that the Pentelikon should have taken action after she had blown the danger signal but she had every right to expect that the Verdi would heed the danger signal and maneuver properly. Nothing that the Pentelikon could have done could have avoided the collision in the light of the Verdi's unexpected turn to port. The Trial Court speaks of the Pentelikon's failure 'to justify her conduct of inaction' but, first, there was no inaction, and second, the burden of justification was not on the privileged vessel."

Statutory Provisions Involved*

RULE 19

"When two power-driven vessels are crossing, so as to involve risk of collision, the vessels which has

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* The Rules quoted are those applicable at the time of the collision. The new Rules became effective on September 1, 1965. See 33 U.S.C. §§ 1051-94. The only quoted Rule affected by the new Rules is Rule 22, wherein, following the word "shall", the words "so far as possible, take positive early action to comply with this obligation, and shall" were added in the 1965 Rules.

the other on her own starboard side shall keep out of the way of the other". (33 U.S.C. § 146[c])

RULE 21

"Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision (see Rules 27 and 29)." (33 U.S.C. § 146[e])

RULE 22

"Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." (33 U.S.C. § 146[f]).

RULE 23

"Every power-driven vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." (33 U.S.C. § 146[g])

RULE 27

"In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above Rules necessary in order to avoid immediate danger." (33 U.S.C. § 146[k])

RULE 28

(a) "When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorised or required by these Rules, shall indicate that course by the following signals on her whistle, namely:

One short blast to mean 'I am altering my course to starboard.'

Two short blasts to mean 'I am altering my course to port.'

Three short blasts to mean 'My engines are going astern.'

(b) "Whenever a power-driven vessel which, under these Rules, is to keep her course and speed, is in sight of another vessel and is in doubt whether sufficient action is being taken by the other vessel to avert collision, she may indicate such doubt by giving at least five short and rapid blasts on the whistle. The giving of such a signal shall not relieve a vessel of her obligations under Rules 27 and 29 or any other Rule, or of her duty to indicate any action taken under these Rules by giving the appropriate sound signals laid down in this Rule." (33 U.S.C. § 147)

RULE 29

"Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (33 U.S.C. § 147[a])

POINT I

The navigation of respondent's vessel, the Pentelikon, was conducted precisely in accordance with Rule 21 of the International Regulations for Preventing Collisions at Sea and the decision below is not in conflict with any decisions of this or any other court construing those regulations.

The leading American authority on the crossing situation under the International Regulations is *Wilson* v. *Pacific Mail S.S. Co.* (*The Newport-The Svea*), 276 U.S. 454 (1928), a case remarkably similar to the case at bar. The Svea, like the Pentelikon, was the privileged vessel, and the Newport, like the Verdi, was burdened. In

reversing a decision of the Circuit Court of Appeals for the Ninth Circuit holding both vessels at fault, this Court stated, at pages 461-62:

> "The Newport kept her course and speed up to the moment of collision and it is admitted that in so doing she was at fault. But her counsel claim that The Svea also was at fault in holding her course and speed and that by acting differently she should have avoided the accident. The evidence does not support that view. Consideration must be given to the circumstances as they appear at the time; not as they are now known. *The Svea adhered to the fundamental rule. If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences.* Having driven him into a perplexing situation, the Newport cannot complain because he failed to make the most judicious choice between the hazards presented." (Emphasis added).

As appears from the Circuit Court of Appeals decision, 15 F.2d 342, 343 (9th Cir. 1926), the Svea held her course until she was within a quarter mile of the Newport and within moments of collision. Here, the Verdi's gross and admitted inattention to her duty placed the Pentelikon's Master in a position of peril very similar to that confronting the Svea's Master. Having done so, it ill behooves the Verdi to suggest now that the Pentelikon's Master's decisions in the crucial moments before collision were a contributing factor.

In an effort to justify a grant of certiorari, Petitioner labors to create a semblance of a conflict between decisions in this Court, in the Ninth Circuit, in the Fourth Circuit, and in the Second Circuit, relying upon cases involving

various navigational situations arising under the Inland Rules.*

Petitioner's quotation (Petition, pp. 7-8) from *The Delaware,* 161 U.S. 459 (1896) is from a paragraph which is followed by this language (p. 469):

> "The cases of the *The Britannia* v. *Cleugh* ('*The Britannia*'), 153 U.S. 130 and *Hutchinson* v. *The Northfield,* 154 U.S. 629, Appx. must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting,** at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden*

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* Under Rule 28 of the International Regulations, 33 U.S.C. § 147, now 33 U.S.C. § 1090, sound signals of one or two short blasts indicate the rudder action being taken. Hence, they are appropriately called "rudder" or "turning" signals. Under Article 18 of the Inland Rules, 33 U.S.C. § 203, on the other hand, such signals are proposals, or signals of intention; vessels navigating in inland waters must, by an appropriate exchange of signals, reach agreement as to the manner in which their passage is to be effected. While cases under either set of Rules may be cited interchangeably on many issues, it is manifest that under the Inland Rules a failure to respond to a signal, or the sounding of a "cross" signal, may alert the navigator of a privileged vessel that something is amiss at an earlier point in time than would a signal sounded under the International Regulations.

** *I.e.,* turning to starboard. When *The Delaware* was decided, steering gear was so constructed that the wheel had to be turned to port in order to turn the rudder and the ship's head to starboard.

v. *Chase,* 150 U.S. 674; *The Highgate,* 62 L. T. 841, 6 Asp. Mar. L. Cas. 512.

* * *

"In the case under consideration there was really nothing to apprise the tug that the Delaware would not port * and go under her stern until the collision became inevitable. . . . Until the last moment the tug had a right to assume that she would comply with the rule. . . ."

The Delaware was decided under the Inland Rules, as were *Postal S.S. Corp.* v. *El Isleo,* 308 U.S. 378 (1940); *The New York,* 175 U.S. 187 (1889); *The City of Chester,* 78 Fed. 186 (4th Cir. 1897); *The George S. Shultz,* 84 Fed. 508 (2nd Cir. 1898); *The Mauch Chunk,* 154 Fed. 182 (2nd Cir. 1907) and *The West Hartland,* 2 F.2d 834 (9th Cir. 1924), cited at pages 7-11 of the Petition.

In *El Isleo, supra,* this Court upheld the validity of Rule VII of the Steamboat Inspectors' Rules, now Section 80.7 of the Pilot Rules for Inland Waters, 33 C.F.R. 80.7, imposing upon both vessels crossing in *inland* waters the obligation to sound a danger signal, and stop and back if necessary, when there is a misunderstanding of, or objection to, a proposal for passing made by a whistle signal.

The privileged vessel in *The New York, supra,* was faulted for failing to respond to a signal proposing a departure from the "Narrow Channel" Rule, Article 25 of the Inland Rules, 33 U.S.C. § 210. The facts did not even remotely resemble those surrounding the Pentelikon-Verdi collision. In short, there is absolutely nothing in the decision of the Court of Appeals in this case in conflict with this Court's construction of the Inland Rules in *The Delaware, El Isleo* or *The New York,* and the decision of the Second Circuit is in complete accord with this Court's decision in the leading case on the crossing situation, *Wilson* v. *Pacific Mail S.S. Co., supra.*

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* *I.e.,* turn to starboard.

Nor has Petitioner been able to demonstrate any conflict between the holding of the Court of Appeals for the Second Circuit in the present case and those of the Court of Appeals for the Fourth and Ninth Circuits. If there was ever a conflict between the Second and the Ninth Circuits, it was set at rest by this Court's reversal of the Ninth Circuit decision in the *Wilson* case, *supra*. In *The West Hartland, supra,* the privileged vessel was faulted for not sounding the danger signal required by the Inland Rules or taking timely steps to avoid collision. The Pentelikon, on the other hand, not only sounded a danger signal, although it was not obligatory under the International Regulations, but twice flashed the "U" signal. With respect to *The West Hartland,* Griffin, the leading American authority on marine collision law, states:

> "The suggestions that 'timely steps' should have been taken is unfortunately vague. It would seem that, under the authorities already discussed, the holding-on vessel was required to maintain her course and speed." Griffin, The American Law of Collision, p. 148.

Some years after deciding *The West Hartland,* the Circuit Court of Appeals for the Ninth Circuit held it inapplicable to the facts of a case where, as here, the privileged vessel's navigator gave a timely danger signal after the burdened vessel's original fault, saying that "thereafter it was the failure of the Myers [the burdened vessel] to respond which caused the situation of imminent peril". *Pacific Atlantic S.S. Co.* v. *United States,* 63 F.2d 414, 417 (9th Cir. 1933).

The collision involved in *The City of Chester,* 78 Fed. 186 (4th Cir. 1897) occurred in the crowded harbor of Norfolk. The privileged vessel was faulted for not sounding the danger signal, which is mandatory under the Inland Rules when the intentions of the other vessel are not understood. Compare *Cia. de Nav. Cebaco* v. *The Steel Fyer,*

200 F.2d 643 (4th Cir. 1952), cert. denied, 345 U.S. 925, which is completely in accord with the decision of the Court of Appeals for the Second Circuit in this case.

In *The George S. Shultz,* 84 Fed. 508 (2nd Cir. 1898) the holding-on vessel was faulted for a deficient lookout causing her to hold course until, as the Court found, it was manifestly impossible for a tug with a schooner in tow in inland waters to take sufficient avoiding action on her own. The Inland Rules also governed the situation facing two ferry boats in *The Mauch Chunk,* 154 Fed. 182 (2nd Cir. 1907) and again the holding-on ferry was faulted for a deficient lookout, which left her unaware of the negligent act of the other ferry in leaving her slip too soon. The facts of neither of these cases bear any resemblance whatsoever to those which confronted the Pentelikon in the present case.

Rule 19 of the Supreme Court Rules does not include a possible conflict between a decision of a Court of Appeals with decisions of foreign courts as a reason for the granting of certiorari. In any event, there is in fact no real divergence between the decision of the Court of Appeals for the Second Circuit in this or any other crossing case and those of the English Courts. Thus, in *The Otranto* [1931] App. Cas. 194, 201 (Petition, p. 10) the House of Lords said:

> "The ship that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely upon obedience to the rule by the ship that has to keep her course. * * * The rule was designed to secure that the stand-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in the face of all existing facts."

This quoted language expresses precisely the same thought as was express by this Court in *Wilson* v. *Pacific Mail S.S. Co., supra,* p. 6.

Petitioner's suggestion that the decision of the Court of Appeals in this case differs from its own prior decisions is best answered by the Court's own opinion.

In *The Comus,* 19 F.2d 774 (2nd Cir. 1927), one of the cases cited by Petitioner as supposedly in conflict with the decision in this case, the holding-on vessel made a 17° change of course to starboard when the vessels were two miles apart, and was faulted for failure to indicate the change with a whistle signal.

Respondent does not understand what is supposed to be "ironic" in the quotation (Petition, p. 11) from the Second Circuit Court of Appeals opinion in *Yang-Tsze Ins. Ass'n.* v. *Furness, Withy & Co.,* 215 Fed. 859 (2nd Cir. 1914). The Court there found the negligence of the giving-way vessel "inexcusable and even unparalleled" (215 Fed., at 865) and held the holding-on vessel at fault because "At the time she ported her helm,* she was a mile away from the Alleghany, and the circumstances had not yet developed which justified any departure from the established rules" (215 Fed., at 862). The Court said, "We are obliged, therefore, to hold that the Pomaran not only violated Article 21 but that in doing so was not excused under Article 27" (215 Fed., at 863). Here, on the other hand, the Pentilikon acted strictly in accordance with the Rules, and was therefore properly held free from fault.

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* *I.e.,* turned to starboard.

POINT II

The decision below correctly applied the standards of reasonableness and causality to the use of electronic aids to navigation in holding that the non-use of radar by the Pentelikon, the privileged vessel, on a clear night was not a fault contributing to the collision.

The Pentelikon was faulted by the District Court for not using radar, even though the night was clear, no special circumstances existed, and both her Master and Watch Officer had had the Verdi under visual observation for at least eight minutes prior to the collision. The District Court did not explain how the absence of any information which might have been obtained from radar could have affected the Pentelikon's statutory duty to maintain her course and speed, or could in any way have contributed to the collision.

No statute or international convention requires vessels to carry radar equipment. However, if a vessel *is* equipped with radar, she is required under the general maritime law to use it when navigating in, or approaching an area of known poor visibility, *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469 (2nd Cir. 1960), affirming 170 F. Supp. 893 (S.D.N.Y. 1959), or when special circumstances are present, as in a case where the area is known to be studded with stationary obstructions to navigation, such as offshore oil well drilling platforms. *The Willowpool*, 214 F. Supp. 865 (E.D. Tex. 1963).

In *The Triton—The Baranof*, 1956 A.M.C. 967 (Supreme Court of Canada, 1964) (not officially reported), the Supreme Court of Canada pointed out the danger of overreliance on radar in the following language:

> "The bare truth is that, on that night, there was no need for radar. The other ship, the Triton, was not equipped with it and no one could seriously

> contend this to be of any significance in this case. As I appreciate the substance of the findings of Smith J., 'paying so much attention to radar' is indicative, as a circumstance rather than a fault, of what Landstrom did instead of what he said he should have done, i.e. paying attention 'to what his eyes could have seen ahead of his vessel.' This he failed to do and this was his fault. In my view, all these arguments centered on the subject matter of radar are, in the circumstances of this case, foreign to the determination of the matter." (p. 988).

Similarly, the Court of Appeals held in the present case that "on a clear night with high visibility it [radar] would not have been superior to, or even effective as, the human eye".

No statute or rule of law requires the use of radar in clear weather, where no special circumstances are present. But even if there were any such requirement, it would be wholly immaterial here. Petitioner's contention that the Pentelikon's Master's estimate of the course of the Verdi was off by approximately 60° is not supported by any finding of fact made by the District Court, and hence it was not "proven by subsequent events" to have been "a critical miscalculation". But if, as Petitioner contends, the Verdi was actually on a course more nearly reciprocal to that of the Pentelikon than the latter's Master thought, then only a very minor alteration to starboard on the Verdi's part would have enabled her to pass astern of the Pentelikon and thus avoid the collision. Having less of an alteration of course to make, the Verdi would need less time to make it and hence a more precise estimate of the Verdi's actual course would not have required the Pentelikon's Master to take avoiding action any earlier than it was in fact taken.

It is self-evident that if the employment of a device or precaution would not in any way have altered a vessel's obligations, an omission to employ it could not possibly be

considered a contributing cause of a collision. Thus, this Court has repeatedly held that the absence of a proper lookout was not a contributing fault where the vessel's navigators had the other vessel under observation at the material times. *The Farragut,* 77 U.S. 334 (1870); *The Dexter,* 90 U.S. 69 (1894); *The Blue Jacket,* 144 U.S. 371 (1892); *The Victory,* 168 U.S. 410 (1897). Nor will such a lack be considered a contributory fault if the vessel in fact did what she ought to have done under the Rules. *The Fannie,* 78 U.S. 238 (1871). Similarly, a vessel will not be faulted for failure to use radar under conditions requiring its use if the failure did not in fact contribute to the collision. *White Stack Towing Corp.* v. *Bethlehem Steel Co.,* 279 F.2d 419 (4th Cir. 1960).

Periodic observations of the screen of a properly functioning radar and careful plotting of the information thereby obtained will enable a navigator to calculate, with reasonable precision, the course and speed of another vessel which is on a steady course and is maintaining a steady speed. Thus, in *Afran Transport Co.* v. *The Bergechief, supra,* an expert testified that a competent radar operator could obtain a general indication of the course and speed of another vessel after a series of radar observations extending over a period of three minutes. Here, however, within a brief period prior to the collision, the Verdi was on several different courses, particularly while she was maneuvering to avoid a third vessel. Even if composite information from the Pentelikon's radar could have become available to her navigators without a time lag, it would have been misleading at best, and could only have reinforced their perfectly proper assumption that the Verdi would fulfill her statutory obligation of giving way in time to avoid the Pentelikon, just as she had maneuvered to avoid the other vessel. Instead of doing so, the Verdi turned to port across the Pentelikon's course in the final moments. It was this reckless maneuver, and not the

Pentelikon's non-use of radar, which, as the Court of Appeals said, "compounded [the Verdi's] faulty navigation" and made the collision inevitable.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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70-271

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ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1816

MAROCEANO COMPANIA NAVIERA S.A.
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Respondent's opposing brief contains a new and serious distortion of fact, and of the District Court's findings, of which this Court should be made aware.

Respondent says (p. 2) that the PENTELIKON "adhered to" the International Rules "by holding course and speed until it became apparent that a collision could not be avoided by action of the burdened vessel alone." But the District Court found that the interval was "several minutes" and the testimony of the PENTELIKON's master proves it. The District Court found (and the Court of Appeals did not disturb this finding) that:

> "When no action was taken by the Verdi, the letter 'U' was again flashed and the Danger Signal pursuant to Rule 28(b) of the International Rules of the Road was sounded on the ship's whistle. **Several minutes later,** Captain Hazapis ordered 'Hard to Starboard' and rang down emergency astern on the telegraph. . ."

Appendix to Petition, p. 4; 392 F. Supp. 489, 491 (emphasis supplied).

The PENTELIKON's master testified that the second flash of the "U" signal and the danger signal occurred at 0140, that he *then* thought that "both" vessels would have to maneuver if collision were to be avoided, *i.e.*, that the VERDI could *not* avoid collision alone, and that the collision occurred 2½ to 3 minutes thereafter. His testimony to this effect is printed *infra,* pp. 5-8.

Thus it was established, and the District Court found, that the PENTELIKON, in violation of Rule 21, held course and speed into the jaws of collision for "several minutes" after it 'became apparent' that the VERDI could not avoid collision alone.

Respondent argues for the first time (p. 3) that "The state of mind of the PENTELIKON's master at that moment [when he sounded the danger signal, at 0140] is therefore wholly immaterial." Ridiculous. Under Rule 21 the PEN-

TELIKON had the duty to "take such action as will best aid to avert collision" when she found herself "so close that collision cannot be avoided by the action of the giving-way vessel alone." This Rule requires the master of the holding-on vessel to reach a conclusion in his own mind as to when that moment has arrived. His state of mind* is, therefore, all-important; and, as he freely admitted (*infra* pp. 5-8), when he flashed the "U" signal the second time and sounded the danger signal, his conclusion was that, if a collision was to be avoided, maneuvers would have to be made by *both* vessels. Rule 21 required him to make a judgment, and, as he testified, he made it. But the same Rule also required him to **act** upon that judgment, and in this he failed utterly. Respondent now insists, for the first time (pp. 3-4), that the irrationality of his failure to act suggests that he did not realize that he should act; but the obvious explanation for his failure is a stubborn insistence upon what he supposed to be his "right of way", in the apparent expectation that the VERDI would somehow be frightened off.

But, unfortunately, the very kind of situation existed which Rule 21 was intended to overcome, *viz.*, the VERDI had lost sight of the PENTELIKON and did not hear or see her signals. This has happened before and will doubtless happen again. In the interest of safety of life at sea the law should be made clear that the holding-on vessel, under Rule 21, *must* "take such action as will best aid to avert collision" when those in charge of her navigation conclude that the giving-way vessel cannot do so by any maneuver of hers alone.

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* Which might have been much improved—certainly the facts at his disposal would have been vastly increased—if he had been using his radar.

Judge Addison Brown, a justly famed exponent of the law of collision, repeatedly asserted the basic proposition that governs here, *viz.*, that a privileged vessel has no right of way into collision; see *The Non Parielle*, 33 F. 524, 527 (S.D.N.Y. 1887); and *The Aurania and The Republic*, 29 F. 98 (S.D.N.Y. 1886), where he said:

> "Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way" (p. 126).

If holding-on vessels, including large oil tankers, are to be held privileged to continue at full speed on a collision course after they have realized the imminent danger and until within 30 seconds of actual striking, life at sea will be perilous indeed, and the risk of damage to life, property and the ecology will be greatly enlarged; the newest breed of oil tanker now building will carry 500,000 tons of petroleum product, often highly explosive or inflammable and always pollutant.

The purpose of this memorandum, as well as that of our Petition, is to convince this Court that the questions here involved are of sufficient importance to warrant—even to require—the attention of this Court; hence we have refrained from pointing out Respondent's errors in analyzing the authorities.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Petitioner

Dated: July 12, 1971

Testimony of Nicholaos Hazapis,
Master of the PENTELIKON

"Q. Did it occur to you then that the time might come when you would have to take some action? A. (Through the interpreter) When I reach here, I put the first flash.

Q. Indicating P-2 and V-2 [on Exh. G]? A. Yes. Then, when I saw that he was not in mind to change her course—when I realize that the collision is—the Verdi doesn't turn, the collision will be coming, and we have to take steps to avoid the collision.

Q. At that time you blew five blasts and flashed the letter "U" again? A. Yes.

Q. That was the situation at that time. Did you do anything else? A. No.

Q. Just the "U" and the five blasts? A. Yes.

Q. Did you have— A. Anything else, you mean what else?

Q. Anything. A. Signal to the Verdi?

Q. Anything at all. A. We check our lights.

Q. Anything else? A. Nothing else. We check our navigation lights. Nothing else.

Q. You checked to make sure that your red side light was burning? A. Running, the masthead.

Q. And the white masthead lights were burning? A. Yes.

Q. I suppose you did that because you were getting worried about the imminence of a collision, is that right? A. Yes.

Q. Did you have any reason to believe at that time that the Verdi had even seen you? A. (Through the interpreter) Since I blow to him, I signalled to him and I flashed him, then I realized that he didn't see me.

Q. When did you realize that, Captain? A. After the second signal we made" (52a-3a).*

* * * * *

* All such references are to the Appendix filed with the briefs in the Court of Appeals.

"Q. Are you telling me, Captain, that— A. 0140 we make the second signal.

Q. The second "U"? A. "U" and the blast.

Q. The five blasts? A. Yes. Then, after doing all those things, about two minutes" (55a).

• • • • •

"Q. Let's go back to the time when you blew your whistle, the five blasts. That was at 0140, I think you told me. Will you look, please, at page 6 of your statement, the last paragraph? You may read it, if you like. A. Yes. "At the time when I blow," this paragraph?

Q. Yes, that is the one, the last one. A. Yes.

Q. Did you have in mind at that time that collision could be avoided if she went hard right and you went hard left? A. Yes.

Q. If she went hard right, your reason for going hard left would be to swing your stern away from him? A. Swing my stern, yes.

Q. Were you thinking at that time then *that you both had to maneuver to avoid collision?* A. *Both*" (64a) (emphasis supplied).

• • • • •

"Q. The next thing you did was go in the wheelhouse and put her on stop and full astern and hard astarboard? A. Yes. Also we blow the three short blasts.

Q. Was that a little less than a minute after you blew the five blasts? A. A minute, about.

Q. That would make that about 0141, is that right? A. Maybe more. Two.

Q. 0141 or 0142? A. 0142.

Q. That would be another minute or two minutes before the collision? A. One minute.

Q. One minute? A. Yes. I calculate one minute. Maybe it was less than one minute. When we saw the collision we cannot avoid, the Verdi doesn't take any attention, we have to take these steps" (46a).

• • • • •

"Q. What is the next thing that happened, Captain, after you sounded the five blasts and flashed the "U" the second time? A. I waited a little bit. After I have seen the Verdi has not made any changes, I went in the wheelhouse and I put the engines in reverse. I told the wheelsman, "All right, starboard. When the wheelsman put—I saw the indicator that it was all starboard, hard starboard.

Q. You say you waited a little bit. How long was that? What is your best estimate? A. Until the time of collision, it was. 0143. 0140, maybe two minutes later.

Q. Are you telling me, Captain, that— A. 0140 we make the second signal.

Q. The second "U"? A. "U" and blast.

Q. The five blasts? A. Yes. Then, after doing all those things, about two minutes.

Q. You mean to say that when you went into the wheelhouse— A. We make the signal. Then we go to the wheelhouse.

Q. Wait until I ask you the question, please. After you flashed the second "U" and blew the five, the next thing you did was go in the wheelhouse and put the engines full astern and give a wheel order. What was the time interval between those things? A. (Through the interpreter) To ring the telegraph, about one minute.

Q. You mean that you rang the telegraph full astern about one minute after you sounded the five blasts? A. Yes. One or two minutes we ring the telegraph.

Q. There is a big difference between one and two minutes, Captain. What is your best estimate? A. About two minutes after.

Q. The telegraph was rung full astern about two minutes after the five blasts? A. Yes.

Q. That would be one minute before the collision at 0143, is that correct? A. Yes" (55a-6a).

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